STATE ACTION AND STATE RESPONSIBILITY

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I. INTRODUCTION

The federal Constitution protects individual rights against invasions by government,[1] or invasions that involve what has been called "state action."[2] It is therefore not surprising that the state action doctrine has been referred to as "the most important problem in American law."[3] Unfortunately, the importance of the state action doctrine has not been matched by its clarity. Despite the doctrine's long history,[4] and recurring litigation concerning the doctrine, the strong academic consensus is that the state action doctrine has been,[5] and remains, a conceptual disaster area.[6] The doctrine nevertheless remains firmly entrenched in the case law.[7] A sound, coherent theory of what constitutes "state action" would therefore be of great value.

The phrase "state action" does not appear in the Constitution. Focus-

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1. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 18-1, at 1688 (2d ed. 1988) (discussing the limited scope of most constitutional protection).

2. *See* Blum v. Yaretsky, 457 U.S. 991, 1002-03 (1982).

3. Black, *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 69 (1967).

4. The state action requirement under the fourteenth amendment is ordinarily traced to the *Civil Rights Cases*, 109 U.S. 3 (1883). *See Blum*, 457 U.S. at 1002. *See generally*, Nerken, *A New Deal for The Protection of Fourteenth Amendment Rights: Challenging the Doctrinal Bases of the Civil Rights Cases and State Action Theory*, 12 HARV. C.R.-C.L. L. REV. 297 (1977); Schneider, *State Action—Making Sense Out Of Chaos—An Historical Approach*, 37 U. FLA. L. REV. 737 (1985).

5. Black, *supra* note 3, at 95.

6. *See generally* L. TRIBE, *supra* note 1, at 1690 (employing the language quoted in text); Chemerinsky, *Rethinking State Action*, 80 NW. U.L. REV. 503, 504 (1985); Choper, *Thoughts on State Action: The "Government Function" and "Power Theory" Approaches*, 1979 WASH. U.L.Q. 757, 757; Friendly, *The Public-Private Penumbra—Fourteen Years Later*, 130 U. PA. L. REV. 1289, 1290 (1982); Phillips, *The Inevitable Incoherence of Modern State Action Doctrine*, 28 ST. LOUIS U.L.J. 683, 683 (1984); Rowe, *The Emerging Threshold Approach to State Action Determinations: Trying to Make Sense of Flagg Brothers, Inc. v. Brooks*, 69 GEO. L.J. 745, 745 (1981); Schneider, *The 1982 State Action Trilogy: Doctrinal Contraction, Confusion, and a Proposal for Change*, 60 NOTRE DAME L. REV. 1150, 1150 (1985).

7. *See, e.g.*, Nat'l Collegiate Athletic Ass'n v. Tarkanian, 109 S. Ct. 454, 461 (1988) (reaffirming importance of state action requirement); West v. Atkins, 487 U.S. 42, 49 (1988) (satisfying fourteenth amendment state action requirement satisfies "under color of state law" requirement for section 1983 purposes); Tulsa Prof. Collection Serv., Inc. v. Pope, 485 U.S. 478 (1988); San Francisco Arts & Athletics, Inc., v. United States Olympic Comm., 483 U.S. 522 (1987). *But cf.* Chemerinsky, *supra* note 6, at 523. Professor Chemerinsky holds that a majority of the Congress that enacted the fourteenth amendment "believed that a state denies equal protection of the law and deprives rights if it tolerates private discrimination and infringements." *Id.* Following such a view, the equal protection clause essentially targets all persons, as opposed to government-related actors only, as the class of potential violators.

ing too literally upon the general idea of "action" by the state may depart, in either an underinclusive or overinclusive way, from the constitutional text. This Article suggests that if state action has been a conceptual disaster area, this condition can be improved by a rigorous application of common sense. The courts should find what is misleadingly called "state action" when, and only when, the state can properly be said to bear responsibility, of the right kind and degree, for the underlying act, condition, or event complained of by the plaintiff. To greatly oversimplify, there is state action where there is state responsibility.

The novelty of this approach does not lie in the mere reference to the idea of governmental responsibility. The cases refer to the idea of responsibility with some frequency,[8] as do some commentators.[9] While it has occasionally been explicitly denied that state responsibility is central to "state action,"[10] the cases and the academic literature more often simply refer to the idea of state responsibility generally without developing the idea at all. It should not be surprising, therefore, that the inquiry remains a conceptual disaster area.

In view of the consensus that the state action theory is a disaster, it is surprising that neither cases nor commentators have attempted to clarify the idea of governments being responsible, in the proper sense, for a state of affairs such that relevant constitutional protections attach.[11] What makes this doubly surprising, particularly with regard to academic commentators, is that there is a large body of philosophical literature not merely on action theory generally, but focusing on one or more senses of the concept of responsibility.[12] Much of this literature applies to ques-

8. *See, e.g.*, San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 544 (1987) (responsibility as relevant to state action); *Blum*, 457 U.S. at 1004; Lugar v. Edmondson Oil Co., 457 U.S. 922, 936-37 (1982); Rendell-Baker v. Kohn, 457 U.S. 830, 840 (1982); Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 164 (1978); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 360 (1974) (Douglas, J., dissenting).

9. *See* L. TRIBE, *supra* note 1, at 1689; Henkin, *Shelley v. Kraemer: Notes For a Revised Opinion*, 110 U. PA. L. REV. 473, 481 (1962).

10. *See* Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656, 677 (1974) (rejecting responsibility-based approach to state action analysis).

11. It may be that on some approaches a government might be responsible to some extent for an occurrence, yet not sufficiently responsible so as to trigger relevant constitutional guarantees. This Article has no quarrel with such approaches.

12. *See generally* E. BODENHEIMER, PHILOSOPHY OF RESPONSIBILITY (1980); J. FEINBERG, DOING AND DESERVING (1970); J. GLOVER, CAUSING DEATH AND SAVING LIVES (1977); J. GLOVER, RESPONSIBILITY (1970); H. HART & T. HONORE, CAUSATION IN THE LAW ch. 3 (2d ed. 1985); 28 TULANE STUDIES IN PHILOSOPHY: STUDIES IN ACTION THEORY (R. Whittemore ed. 1979); Baldwin, *Foresight and Responsibility*, 54 PHIL. Q. 347 (1979); Flores & Johnson, *Collective Responsibility and Professional Roles*, 93 ETHICS 537 (1983); Goodin, *Apportioning Responsibilities*, 6 L. & PHIL. 167 (1987); Goodin, *Responsibilities*, 36 PHIL. Q. 50 (1986); Haines, *Responsibility and Accountability*, 30 PHIL. Q. 141 (1955); Hart, *Varieties of Responsibility*, 83 L.Q. REV. 346 (1967); Haydon, *On Being Responsible*, 28 PHIL. Q. 46

tions of the responsibility of abstractions or collectivities such as the state, and some of the literature is authored by persons with a particular interest in legal philosophy.[13] Yet it can fairly be said that those concerned with state action, or state responsibility, have essentially ignored this obviously relevant literature.

What accounts for the universal failure to draw upon this rich philosophical literature in order to ameliorate the conceptual "disaster" is not clear. One can possibly argue that while the fourteenth amendment, for example, does not speak of state action or inaction, neither does it speak of state responsibility; instead it speaks in terms of making and enforcing, depriving, and denying.[14] The cases, however, and some of the academic commentary, have adopted the concept of state responsibility.[15] This Article will illustrate why it is sensible to adopt this concept. Of course, the analysis of responsibility in any controversial setting will involve "many serious problems."[16] There is no reason to believe, however, that progress cannot be made by drawing upon the insights available in the relevant philosophical literature. If the alternative is merely continuing conceptual disaster, there seems little to lose in the attempt.

II. AN OVERVIEW OF CURRENT STATE ACTION DOCTRINE

Even a brief examination of state action case law reveals a profusion of controversial tests and considerations of uncertain scope. A recent Supreme Court case provides the following general starting point:

> In the typical case raising a state action issue, a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the State was sufficiently involved to treat that decisive conduct as state action. This may occur if the State creates the legal frame-

(1978); Honore, *Responsibility and Luck*, 104 L.Q. REV. 530 (1988); Husak, *Omissions, Causation and Liability*, 30 PHIL. Q. 318 (1980); Kagan, *Causation and Responsibility*, 25 AM. PHIL. Q. 293 (1988); Mellema, *On Being Fully Responsible*, 21 AM. PHIL. Q. 189 (1984); Miller, *Foresight, Intention and Responsibility*, 27 S.J. PHIL. 71 (1989); Pitcher, *Hart on Action and Responsibility*, 69 PHIL. REV. 226 (1960); Sober, *Apportioning Causal Responsibility*, 85 J. PHIL. 303 (1988); Thompson, *Ascribing Responsibility to Advisers in Government*, 93 ETHICS 546 (1983); Walsh, *Pride, Shame and Responsibility*, 28 PHIL. Q. 1 (1978); Weinryb, *Omissions and Responsibility*, 30 PHIL. Q. 1 (1980); Zimmerman, *Negligence and Moral Responsibility*, 20 NOUS 199 (1986); Zimmerman, *Sharing Responsibility*, 22 AM. PHIL. Q. 115 (1985).

13. *See generally*, *supra* note 12 (materials authored by writers such as H.L.A. Hart, Tony Honore, and Joel Feinberg).

14. Glennon & Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221, 228 (P. Kurland ed. 1977) (noting fourteenth amendment's literal focus on the state's depriving or denying, rather than acting).

15. *See supra* notes 8-9 and accompanying text (collecting authorities). The concept of attributing responsibility to an organization or other abstract or collective entity, such as a government, seems well-established. *See*, Walsh, *supra* note 12, at 8 ("the acts and decisions of a nation").

16. Weinryb, *supra* note 12, at 1.

> work governing the conduct, . . . if it delegates its authority to the private actor, . . . or sometimes if it knowingly accepts the benefits derived from unconstitutional behavior. . . . Thus, in the usual case we ask whether the State provided a mantle of authority that enhanced the power of the harm-causing individual actor.[17]

The Court cites as an example of this process the inquiry into "whether there is a sufficiently close nexus between the State and the challenged . . . action of the regulated entity so that the action of the latter . . . may fairly be treated as that of the State itself."[18]

Each of these particular inquiries is subject to controversial exceptions of uncertain breadth. From a perspective that focuses instead on state responsibility, each of these inquiries is problematic. Without yet having explored the concept of responsibility, it nonetheless seems clear that the above formulations create as many problems as they resolve. For example, the "nexus" test, drawn from *Jackson v. Metropolitan Edison Company*,[19] asks whether the private defendant's action "may fairly be treated as that of the State itself."[20] In its most literal sense, this test is too stringent. Often, we hold persons responsible for merely aiding and abetting, for making some event possible, or for endorsing or approving an act they did not perform.[21] The state would, in such cases, share responsibility for an action, event, or its consequences,[22] without the state itself being deemed to have undertaken that action.[23] If the language in *Jackson* is to be read more broadly, the analysis of responsibility below may help to clarify its legitimate and defensible bounds.

The language quoted from *Jackson* is not without value. In some respects, it usefully qualifies other formulations of the state action inquiry. For example, it may in some cases be too restrictive to focus on "whether the State provided a mantle of authority that enhanced the power of the harm-causing individual actor."[24] The state may, for example, explicitly approve of an action only after it takes place, without assisting the pri-

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17. National Collegiate Athletic Ass'n v. Tarkanian, 109 S. Ct. 454, 462 (1988).

18. *Id.* at 462 n.12 (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974)).

19. 419 U.S. 345, 351 (1974).

20. *Id.*; *see* Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 157 (1978).

21. It seems clear that we sometimes hold persons responsible, because of what they did or failed to do, with respect to the acts of another.

22. The concept of shared or partial responsibility seems well established. *See*, Miller, *supra* note 12, at 83. This issue is further discussed, *infra*, in text of Section IV.

23. But note the possible moral distinction between the state itself actually making a decision and the state's merely enforcing the decision of another. *See*, Van Alstyne, *Mr. Justice Black, Constitutional Review, and the Talisman of State Action*, 1965 DUKE UNIV. L.J. 219, 223.

24. National Collegiate Athletic Ass'n v. Tarkanian, 109 S. Ct. 454, 462 (1988).

vate actor at the time of or before the action in question.[25] The state has, therefore, clearly not "enhanced the power of" the actor, at least until the relevant act was completed. No state action would be present, therefore, on the power-enhancement test.

If the state's later ratification of the private act is clear, strong, unequivocal, and consciously considered, however, perhaps the state then has come to share responsibility for the prior act with the private actor, or at least it becomes reasonable to think of the state as though it were partly responsible for the otherwise private act.[26] One way of formulating this idea would be through the *Jackson* "nexus" inquiry into whether the initially private action may fairly be considered as that of the state.[27] If the state at any point sufficiently identifies itself with the challenged private action, the state may be said to have assumed some measure of responsibility for that action.

Similar tests have been applied to cases in which the government assisted, encouraged, controlled, or merely was involved with the private party, in some way directly or indirectly related to the particular challenged private activity. One broad formulation expounds that "when private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found."[28] Even this relatively liberal formulation would require that the state assistance be "overt" before it could rise to the level of state action. Focusing instead on state responsibility would suggest that covert state assistance as well may suffice. The overt or covert nature of the state assistance may still feed into the question of state action in cases in which public perception of the state's role in assisting the private actor becomes relevant.[29] If the public sees no connection between the state and the private action, the plaintiff can hardly claim that the state has endorsed the private action.

In contrast, the Court has also held that a state "normally can be held

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25. The possibility of shared responsibility between or among persons who act at different times is also recognized in the literature. *See*, Zimmerman, *Sharing Responsibility*, 22 AM. PHIL. Q. 115, 116 (1985).

26. Consider the language in Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961), where the Court discussed the possibility of a state abdicating its responsibilities by failing to censure racial discrimination under particular circumstances. *See* Edmonson v. Leesville Concrete Co., 860 F.2d 1308, 1312 (5th Cir. 1988), *aff'd*, 895 F.2d 218 (1990).

27. These apparently casual references to private as opposed to public actions, as though the distinction between public and private were invariably luminously clear, are made only to avoid premature complications. This article discusses the obviously problematic character of the public/private distinction at various points below, particularly in the text of Section IV.

28. Tulsa Collection Serv., Inc. v. Pope, 485 U.S. 478, 485 (1988) (citing, *inter alia*, Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982)).

29. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (considering public perception of state's role in apparently sanctioning racial discrimination by putatively private actor).

responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government]."[30] While this formulation rightly reintroduces the possibility of covert state action, in other respects it seems far too restrictive on a reasonably literal interpretation. No reason exists to assume that a state can never share responsibility for private choice, even in some cases in which the state's assistance to the private actor was unnecessary, or was causally insignificant. This might occur where the private actor would have made the same choice without the state's encouragement. In such a case, the actual choice is clearly that of the private actor rather than that of the government. The government may on such occasions, however, approve of the private action, before or after the occurrence of that private action, and state responsibility may attach.

Admittedly, the Court has said on several occasions that "mere approval" by the state of a private actor's choice cannot rise to the level of state action.[31] This statement is probably misleading at best. The problem arises in ordinary contexts because one person's mere approval of the acts of another, depending upon the circumstances, may indeed suffice to incur responsibility. A private business person's signature on a document prepared by another person in a context manifesting approval is one example. The signature here may suffice to make the signer responsible for the contents of the document or their consequences, without the actual signature having encouraged, significantly or otherwise, the actual preparer of the document.

Another problem lurking in the case law is whether state action requires a strong linkage between the government's involvement and the specific private action complained of, or whether the government's mere general involvement with the private actor can be so pervasive, intimate, thorough, and substantial that a specific linkage to the particular private action being challenged is unnecessary for state action to exist. Some Justices appear to accept the latter possibility. For example, in a recent case, the Court held that the state's involvement in the challenged private action was so "substantial and pervasive" and intimate in so many significant respects, as opposed to being merely "limited" state involvement, that state action must be found.[32] Following such an approach, "where

30. San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 546 (1987) (quoting Blum v. Yaretsky, 457 U.S. 991, 1004 (1982)).

31. *Id.* (quoting *Blum*, 457 U.S. at 1004-05); *see* Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 164 (1978) (citing Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 (1954); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972)); *Edmonson*, 860 F.2d at 1316 (Gee, J., dissenting), *aff'd*, 895 F.2d 218 (1990).

32. *Pope*, 485 U.S. at 487.

the State has so thoroughly insinuated itself into the operations of the [private] enterprise, it should not be fatal if the State has not affirmatively sanctioned the particular [challenged] practice in question."[33] At the extreme, even the state's "creation of a favorable milieu"[34] for the challenged private action, without a more specific, concrete linkage, may suffice for state action.

In contrast, a number of state action cases require the showing of a sufficient, direct linkage between the state and the particular challenged action or decision by the private party.[35] Even pervasive, generally detailed state regulation of the private actor may not suffice for state action.[36] Following such a view, if the specific challenged private action was actually independent of the regulation, state action is not present.[37] Such a view might even call into question the presence of state action in the classic constitutional law case of *New York Times v. Sullivan*,[38] in which the libel plaintiff merely took advantage of the general availability of uniform, broad rules of Alabama state libel law.[39]

Focusing on the concept of responsibility in this context cannot make unavoidably close cases easy; however, it may help to remove obstacles to proper analysis. The more restrictive cases are clearly correct in holding that responsibility requires some sufficient connection to the particular act or event in question. If no such specific nexus is required, ascriptions of responsibility become arbitrary. The less restrictive cases are also valuable in implying that responsibility may be assigned on the basis of an indirect, multi-linked, vague, and even speculative or probabilistic connection to the particular challenged act. When we ascribe partial responsibility to a parent for a child's act of rudeness, we presume some sort of connection between the parent and the particular act of rudeness in question; however, we may have in mind only a vague, speculative, largely unknown general course of parental conduct or omission as constituting or creating that connection. Nevertheless, our ascription of responsibility to the parent may be justified. For an example based on the state action cases, consider a simplified version of *Burton v. Wilmington Park-*

33. *Jackson*, 419 U.S. at 370 (Marshall, J., dissenting); *see* Rendell-Baker v. Kohn, 457 U.S. 830, 844-46 (1982) (Marshall, J., dissenting) (urging a relatively broad approach to state action in this regard).

34. Karst & Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39, 53 (P. Kurland ed. 1968) (discussing Reitman v. Mulkey, 387 U.S. 369 (1967)).

35. *See Kohn*, 457 U.S. at 841 (requiring a relatively concrete, affirmative relationship); *Jackson*, 419 U.S. at 358-59.

36. *See, e.g., Blum*, 457 U.S. at 1007-10; *Kohn*, 457 U.S. at 841; *Jackson*, 419 U.S. at 358-59.

37. *See* Phillips, *supra* note 6, at 715.

38. 376 U.S. 254 (1964).

39. *See* Van Alstyne, *supra* note 23, at 228-29.

ing Authority.[40] We shall assume that the state does not approve of or encourage racial discrimination by private parties, but it accepts otherwise unavailable tax money generated by such private racial discrimination. A specific linkage between the state and the private discrimination exists, but it is attenuated. We may nevertheless suggest that the government's acceptance of, and benefit from, the "blood money" of racial discrimination suffices to taint or implicate the state in some measure of responsibility for the private discriminatory conduct.

A final general test for state action encountered in the case law provides that courts may find state action where the "private" actor performed the challenged act while engaging in some function that has traditionally been reserved exclusively to the state or federal government.[41] This test has its roots in the well-known privately owned "company town" case of *Marsh v. Alabama*,[42] in which the Court held that the company town was a state actor by restricting the distribution of literature. Critics of this formulation have questioned whether the function must be one reserved exclusively to the government,[43] as well as whether the function involved must have been "traditionally" reserved to the government.[44]

Focusing instead on the idea of responsibility allows us to understand both the logic and the limitations of the public function approach to state action. If a "private" actor has been designated as the authorized agent of the state in the relevant respects, the state may retain some responsibility for the acts of that private party. On the other hand, if the state delegates away certain of its enterprises, as through privatization, it may, depending on the circumstances, properly divest itself of responsibility. Public function doctrine is of little assistance in this regard. The crucial inquiry may be whether the state has, through the device of delegation, sought to insulate itself, circumvent constitutional requirements, or evade responsibility.

Let us suppose that the record clearly establishes that the state has privatized a certain activity with the sole aim of facilitating racial discrimination in the conduct of that activity. The state would generally be

40. 365 U.S. 715 (1961).

41. *See, e.g.*, San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 544 (1987); *Blum*, 457 U.S. at 1011; *Kohn*, 457 U.S. at 842; *Jackson*, 419 U.S. at 352.

42. 326 U.S. 501 (1946); *see* Terry v. Adams, 345 U.S. 461 (1953).

43. *See* San Francisco Arts & Athletics, Inc., 483 U.S. at 549 & n.1 (Brennan, J., dissenting).

44. Professor Tribe has pointed out that the Court has found the distinction between traditional and non-traditional governmental functions to be unworkable and unsound in another context. *See* L. TRIBE, *supra* note 1, at 1706 n.4 (citing Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 543-46 (1985)). *But see* Schneider, *supra* note 6, at 1168 (approving of traditional/non-traditional function distinction in state action context).

at least partially responsible for the private discrimination, even if the state had genuinely and completely abandoned all control over the conduct of the now private function.[45] It is worth noting that this analysis would likely be the same whether or not the function was one traditionally reserved to the state.[46]

The mere fact of government delegation or privatization of even a traditionally exclusive government function, therefore, cannot tell us whether the state retains responsibility in the area delegated. While privatization cannot automatically work a release of government responsibility,[47] neither is it necessarily ineffectual or inherently suspect.[48] When the state can show that in good faith and for coherent reason it delegated an activity to a private actor without retaining the right to control the private actor in the respects relevant to the challenged action, the state should generally be absolved from responsibility for that action. This is particularly true where the state did not specifically foresee the challenged private action at the time of delegation. With due allowances for the state's sovereign and public character, this result would roughly follow the logic of the law of responsibility for the acts of an independent contractor.[49] State action would therefore not attach.

An initial excursion through some of the most prominent tests for state action, even without a detailed examination of the philosophical literature on responsibility, reveals a great deal of confused and dubious law. The Court has even admitted its own uncertainty as to whether its various apparently different tests are different in operation, or whether they all simply aim at generally sifting the often subtle individual fact situations presented in the cases.[50] The thesis introduced above suggests that focusing on the idea of state responsibility can reduce the doctrinal confusion, and some progress in clarifying the idea of state action has already been made.

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45. Note the Court's pragmatic analysis and the analysis in terms of "circumvention" in Terry v. Adams, 345 U.S. 461, 469 (1953).

46. *But see* Schneider, *supra* note 6, at 1168 (considering whether the function in question is one traditionally reserved to the state).

47. *See* San Francisco Arts & Athletics, Inc., 483 U.S. at 560 (Brennan, J., dissenting).

48. *But see, Kohn*, 457 U.S. at 849 & n.3 (Marshall, J., dissenting) (state action still attaches after good faith delegation of state authority if "constitutional values" still threatened); Milo v. Cushing Mun. Hosp., 861 F.2d 1194, 1197 (10th Cir. 1988) (lease to or contracting for management with private entity does not allow state to "escape liability" even in absence of suspicious motives underlying delegation).

49. *See* Schneider, *supra* note 6, at 1169 (analogy to tort liability for acts of an independent contractor). Of course, the point of claiming state action is not to help build a case for the state's legal liability, or the state's answerability in damages. Showing the state's "responsibility" merely allows the suit against "private" actors to proceed to the merits on the relevant constitutionally-based theory.

50. *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 939 (1982).

We are in a position to be skeptical of the consensus view that the concept of state action is inherently, irredeemably confused,[51] or that state action is a useless concept because state action actually exists in any litigated case.[52] This is because no one has claimed that the idea of responsibility, or state responsibility, is itself irredeemably confused. Progress can be made on delimiting the scope of state responsibility. As we shall explore further below, for example, it is a mistake to think of a sovereign state as responsible for all private conduct resembling a constitutional violation. There are no sound conceptual grounds for doing so, and such a view is not required by a consistent concern for the variety of serious threats to constitutional values posed by private actors.

III. STATE ACTION, STATE RESPONSIBILITY, AND THE DEFENSE OF CONSTITUTIONAL VALUES

The temptation to simply slice through the complexity, by abolishing the state action doctrine, is strong in an era of an activist, post-New Deal state. Following such a view, the government would be deemed responsible for every private act that would be a constitutional violation if performed by the government itself. As we shall see, however, even activist states assume a limited scope of responsibility, and have sound reasons for retaining a state action doctrine in some form.

A number of justifications have been offered for the state action doctrine beyond the fact that the relevant constitutional provisions plainly require some type of state action doctrine. One writer has cited "restraining government power, acknowledging the role of government as exemplar, maintaining the separation of powers, and strengthening federalism as underlying the state action doctrine."[53] It is often suggested, somewhat circularly, that a further aim of the state action doctrine

51. *See, e.g.*, Horowitz, *The Misleading Search For "State Action" Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208 (1957) (maintaining that the state action doctrine is inherently confused); Phillips, *The Inevitable Incoherence of Modern State Action Doctrine*, 28 ST. LOUIS U.L.J. 683 (1984); Williams, *The Twilight of State Action*, 41 TEX. L. REV. 347 (1963); *see generally* Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982).

52. *See, e.g.*, Black, *supra* note 3, at 70; Chemerinsky, *supra* note 6, at 522; Heins, *"The Marketplace and the World of Ideas": A Substitute For State Action as a Limiting Principle Under the Massachusetts Equal Rights Amendment*, 18 SUFFOLK U.L. REV. 347, 349 (1984); Horowitz, *supra* note 51, at 208-09; Nerken, *supra* note 4, at 298 ("state action . . . is always there"); Tushnet, *Shelley v. Kraemer and Theories of Equality*, 33 N.Y.L. SCH. L. REV. 383, 385 (1988) (referring to "the conventional observation that judicial action in enforcing common law rules unproblematically constitutes state action"); Van Alstyne, *supra* note 23, at 231; Williams, *supra* note 51, at 367.

53. Jakosa, *Parsing Public From Private: The Failure of Differential State Action Analysis*, 19 HARV. C.R.-C.L. L. REV. 193, 232 (1984) (citing traditional justifications for state action doctrine).

should be the "satisfaction of public expectations."[54] Along these lines, Professor Black has suggested that while, in a sense, any substantial litigated case with public policy implications will involve state action, the equal protection clause should not apply to "the private life which people really do, in general, expect to live privately. . . ."[55] Similarly, Professor Sunstein has characterized the state action inquiry as one into whether the state "has deviated from functions that are perceived as normal and desirable."[56]

One problem is that what the public expects or considers normal in this area will depend in some measure on how the courts have decided constitutional cases. Even with this partial circularity set aside, though, a theory of state action is incomplete unless it can suggest why, substantively, popular expectations are what they are, on grounds independent of established constitutional doctrine. This Article suggests that depending upon a wide variety of factors discussed at length below, people either do or do not deem the government responsible for particular acts or omissions by private parties.

It is possible to object that all justifications of the state action doctrine fail to appreciate the range of contemporary threats to the constitutional values and individual liberties sought to be protected by the Constitution. Simply put, scholars argue that private actors, even without any special assistance from the government, "may limit personal rights as effectively as the government."[57] Through the concentration of wealth and power in private, often corporate, hands,[58] private sanctions can possibly chill freedom of speech as much as public sanctions.[59]

Such an approach is not easily dismissed. It is clearly more difficult for an employee of a private corporate monopoly, who has great investments in firm-specific job skills, to resign when facing a free-speech threat from that employer than for a resident of one state to move to another state to avoid a governmental free-speech threat. The drafters of the state action requirement, however, may reasonably have believed that governmental invasions of free-speech interests, for example, were likely to be more frequent, or more severe, or less avoidable at relatively low cost, than private corporate invasions, at least in a predominantly competitive market economy.

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54. Schneider, *State Action—Making Sense Out of Chaos—An Historical Approach*, 37 U. FLA. L. REV. 737, 737 (1985); *see* Schneider, *supra* note 6, at 1155.

55. Black, *supra* note 3, at 101.

56. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 887 (1987).

57. Note, *State Action: Theories For Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656, 657 (1974).

58. *See* Chemerinsky, *supra* note 6, at 510.

59. *See* Chemerinsky, *supra* note 6, at 510; Phillips, *supra* note 6, at 727.

Just as important, though, is the fact that being censored or being subject to discrimination by the state tends to be different from, and indeed worse than, censorship or discrimination by a typical private actor. Persons rejected on the basis of race by a private employer obviously receive an injury deserving of some sort of effective legal redress. Persons rejected on the basis of race by their own government, however, receive a peculiarly ultimate rejection, with formal, official endorsement by a body authorized to speak for society as a whole.[60]

The defense of a state action doctrine must not be conducted in unduly simplistic terms. The Courts quite often suggest that the state action doctrine serves the cause of promoting individual liberty. The United States Supreme Court in *Lugar v. Edmonson Oil Company*,[61] for example, maintains that the state action doctrine "preserves an area of individual freedom by limiting the reach of federal law and federal judicial power."[62] The Court has repeated this language elsewhere,[63] with the general approval of a number of academic commentators.[64] A variant of this claim holds that the state action doctrine sacrifices equality in some respects for the sake of individual liberty.[65]

Such a view requires elaboration at the very least. This view overlooks the fact that the effects of the state action doctrine on individual liberty are necessarily mixed and equivocal. As one commentator has pointed out, "[n]o matter how a court decides, someone's liberty will be expanded and someone's liberty restricted."[66] The case of *Burton v. Wilmington Parking Authority*[67] provides a suitable example. The Court's finding of state action inevitably reduced the defendant restaurant owner's freedom of choice or freedom of association, just as it expanded the range of restaurant choices or the freedom of personal choice of the plaintiff, who had been subject to racially-based exclusion by the restaurant.[68]

Recognizing that any state action decision will have equivocal effects on individual liberty does not mean that, with respect to individual liberty, a court can make the decision in any state action case arbitrarily. In *Burton*, the Court found state action, triggering the applicability of the

60. *See* Jakosa, *supra* note 53, at 224-25 (discussing special character and role of the state).
61. 457 U.S. 936 (1982).
62. *Id.*
63. National Collegiate Athletic Ass'n v. Tarkanian, 109 S. Ct. 454, 461 (1988); *see* Tushnet, *supra* note 52, at 398 (quoting the language at issue).
64. *See* L. TRIBE, *supra* note 1, § 18-2 at 1691 (reporting the standard view).
65. *See* Henkin, *supra* note 9, at 488; Schneider, *supra* note 6, at 1154.
66. Chemerinsky, *supra* note 6, at 536.
67. 365 U.S. 715 (1961).
68. *See id.* at 716.

equal protection clause.[69] The importance of individual liberty justifies the result in that some restrictions on individual liberty are of a particularly objectionable character, and should not be tolerated, even if that loss of liberty makes possible a superficially parallel gain in individual liberty for another person. In *Burton*, the combined restaurant and public parking facility bore "official signs indicating the public character of the building, and flew from mastheads on the roof both the state and national flags."[70] From this single element alone, setting aside any element of subsidy, mutual benefit, or other grounds for finding state action in the case, a logical defense of *Burton* can be built.[71] Persons denied restaurant service on racial grounds could reasonably have believed, under the circumstances, that the public authority itself branded them as inferior.

This sort of restriction on individual freedom is, as we have seen, qualitatively worse than the restriction involved in requiring non-discrimination on the part of the restaurant owner.[72] While the latter restriction reduces the owner's freedom and stands in some sense as an official repudiation, it presumably does not typically strike as profoundly humiliating a blow as apparent state endorsement of one's essential general inferiority. Even if the state did not itself inflict the latter sort of injury, or in any fashion itself racially discriminate, the *Burton* Court rightly held the state at least partially responsible for the injuries of which the plaintiffs complained.

There is therefore some logic to the view that injuries for which the state maintains at least partial responsibility tend to be in some sense "worse," thus helping to account for the existence of the state action doctrine. One cannot deny, however, that some affronts, for which no responsibility lies with the state, may rise to grievous proportions and call for legal redress. The state action doctrine, however, does not operate to bar legal redress in such cases. Sources of redress against all significant instances of unfairness exist outside of the federal Constitution. For remedies of injustices for which the state cannot be found responsible, persons may look to sources such as contract law,[73] the common law in general,[74] state statutory or constitutional law,[75] or the full panoply of

69. *Id.* at 725-26.

70. *Id.* at 720.

71. *See id.* at 724.

72. *See supra* note 60 and accompanying text (discussing role of state and impact upon rejection by state).

73. At least some private employment contracts specify the equivalent of a minimum level of due process in employment termination. Where they do not, this exclusion may be part of a voluntary tradeoff reflecting the interests of both the employer and the employee. *See* Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984).

74. The common law tort of intentional infliction of emotional distress, for example, has

federal statutory protections not dependent upon a showing of state action. Chief among the latter would be the Civil Rights Act of 1964,[76] which the courts have upheld on the basis of the commerce clause, thereby bypassing any state action requirement.[77] As a result, "state action cases involving racial discrimination are infrequent today."[78]

In sum, it is at best a wild exaggeration to suppose that "courts are powerless to halt private infringements of even the most basic constitutional values."[79] Instead, the state action doctrine is justifiable on the ground that the advantages of not broadly extending federal constitutional protection outweigh the net harms suffered in the often borderline cases in which the interests of the plaintiff, the defendant, and the general public are such that no law, state or federal, common or statutory, affords the plaintiff relief.[80]

IV. THE CONCEPT OF RESPONSIBILITY AND ITS IMPLICATIONS FOR STATE ACTION DOCTRINE

A. Is the Concept of Public Responsibility Viable?

Thus far, this Article has developed some grounds for doubting that the concept of state action must necessarily remain a "conceptual disas-

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been employed in cases of an employer's egregious and overt racial bigotry. *See, e.g.*, Alcorn v. Anbro Eng'g. Inc., 2 Cal. 3d 493, 468 P.2d 216, 86 Cal. Rptr. 88 (1970) (en banc) (also involving arbitrary adverse employment decisionmaking); Contreras v. Crown Zellerbach Corp., 88 Wash. 2d 735, 565 P.2d 1173 (1977) (involving tort of outrage including verbal abuse).

75. *See* Casebeer, *Toward a Critical Jurisprudence—A First Step by Way of the Public-Private Distinction in Constitutional Law*, 37 U. MIAMI L. REV. 379, 415 (1983). For example, free speech rights may in the absence of state action be protected under state, but not federal, constitutional law; *see also* Pruneyard Shopping Center v. Robins, 447 U.S. 74, 78 (1980) (affirming California Supreme Court decision below reported at 23 Cal. 3d 899, 910, 592 P.2d 341, 347, 153 Cal. Rptr. 854 (1979)). *See generally* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

76. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 28 U.S.C. § 1447 (1982), 42 U.S.C. § 1971, 1975a-1975d, 2000a-2000h-6 (1982 & Supp. IV 1986)).

77. *See* Katzenbach v. McClung, 379 U.S. 294, 304 (1964) (deciding civil rights case on basis of commerce clause as opposed to an equal protection theory); *see also* G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, CONSTITUTIONAL LAW 1499 (1986) (discussing 1964 Civil Rights Act as largely bypassing the public accommodations racial state action controversy); Quinn, *State Action: A Pathology and a Proposed Cure*, 64 CALIF. L. REV. 146, 159 (1976) (State action issue limited and less compelling after Civil Rights Act of 1964).

78. *See* Phillips, *supra* note 6, at 740 & n.292.

79. Chemerinsky, *supra* note 6, at 508.

80. It should be noted, however, that the filing of a section 1983 action, which requires that the challenged action have been performed under color of state law, does not allow the plaintiff to recover in the absence of state action. Under the current case law, the two requirements are essentially equivalent. *See* West v. Atkins, 487 U.S. 42, 49 (1988) (closely identifying the two doctrines); Lugar v. Edmondson Oil Co., 457 U.S. 922, 928-32, 935 & n.18 (1982); *Kohn*, 457 U.S. at 838; United States v. Price, 383 U.S. 787, 794 n.7 (1966) ("[i]n cases under § 1983, 'under color' of law has consistently been treated same as 'state action' required under Fourteenth Amendment"); L. TRIBE, *supra* note 1, § 18-4, at 1703 n.2.

ter area,"[81] or that, on a dispassionate analysis, state action must always be present in any litigated case,[82] and this Article has also considered a number of other misconceptions remediable by focusing more closely on the concept of responsibility. Further direction for the state action doctrine can be drawn from a more detailed examination of the massive amount of technical literature on the concept of responsibility itself.[83]

Focusing on the concept of responsibility allows us to resist the temptation to infer case law inconsistency from the existence of close, factually sensitive opinions, to infer the absence of rules[84] or clear principles[85] from the presumably inconsistent case law, and to infer the eventual demise of the concept of state action from the absence of any such principle.[86] The conclusion that the state action doctrine has lost some meaning[87] or all meaning[88] is reinforced by the broader conclusion that the distinction between public and private in general is becoming increasingly meaningless,[89] or even that "it has no logical content at all."[90] For the broader claim to be true, the skeptic would have to show not merely that the public-private distinction is manipulable or has historically shifted, but that in such core cases as a routine death penalty prosecution, one could plausibly argue that no state action is involved. Critics of the state action distinction might, with greater justification, aim their criticism at the often difficult distinction between, for example, proximate cause and "remote" cause in tort litigation. One can rightly sense, however, that trying to abolish this controversial distinction in substance and not merely in name would involve real and substantial losses in the fairness of tort law adjudication.[91] State action doctrine is similarly conceptually messy, but practically necessary.

Some critics have been willing to concede that the public-private dis-

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81. *See supra* notes 5-6 and accompanying text.

82. *See supra* note 52 and accompanying text.

83. *See supra* note 12 and accompanying text.

84. *See* L. TRIBE, *supra* note 1, § 18-1, at 1690.

85. *See* Chemerinsky, *supra* note 6, at 503-04.

86. *See, e.g.*, Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855, 855 (1966); Williams, *supra* note 51, at 367.

87. *See* Schneider, *supra* note 6, at 1150 n.4 (referring to a range of contemporary opinion).

88. Glennon & Nowak, *supra* note 14, at 222.

89. *See, e.g.*, Nerken, *supra* note 4, at 298; Phillips, *supra* note 6, at 725 & n.213.

90. Freeman & Mensch, *The Public-Private Distinction in American Law and Life*, 36 BUFFALO L. REV. 237, 248 (1987); *see id.* at 249 ("anything can be described as public or private").

91. *See*, W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 264 (5th ed. 1984) (proximate cause as necessary limitation on otherwise infinite potential responsibility). For the same considerations under another rubric, *see* Thode, *Tort Analysis: Duty-Risk v. Proximate Cause and the Rational Allocation of Functions Between Judge and Jury*, 1977 UTAH L. REV. 1, 11.

tinction is in no worse shape than other familiar legal distinctions only because the latter, having been "exposed" as being socially created rather than natural in character,[92] are themselves increasingly bankrupt and arbitrary.[93] Professor Duncan Kennedy consigns such distinctions as reason-fiat and freedom-coercion to the same declining status as public-private.[94] To the degree that the ability to distinguish intelligently between reason and fiat, or between freedom and coercion,[95] diminishes, law review articles that suggest that, in the name of freedom and reason, the courts should abolish the meaningless state action doctrine become more pointless. This Article shall assume that the state action doctrine is at least potentially as viable as Professor Kennedy, through his commitment to reasonable law review articles, in practice assumes the reason-fiat distinction to be.

Turning with some reasonable confidence to the philosophical literature on responsibility itself, two preliminary hurdles can be cleared easily. First, one should not be discouraged by the recognition that the concept of responsibility arises in a variety of contexts and may take on a variety of meanings. Development of a general theory of responsibility may be unattainable.[96] Seeing how responsibility does or could operate in the particular context of state action can proceed independently.[97] Second, no sound reason exists in the literature leading to the conclusion that government responsibility is necessarily limitless. It has been argued that "the government is 'omnipresent' with or without the state action doctrine; either the government is preventing violations or it is allowing them to occur."[98] In some sense, this may be harmlessly true; but we should not so quickly infer that the government is responsible without limits, in view of its claims to territorial sovereignty or to a monopoly of the legitimate use of force. Just as we normally repudiate[99] the exotic view that private individuals are morally or causally responsible without

92. *See* Lessard, *The Idea of the "Private": A Discussion of State Action Doctrine and Separate Sphere Ideology*, 10 DALHOUSIE L.J. 107, 107 (1986).

93. *See generally* Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1354-55 (viewing public-private distinction on a continuum reveals its flaws).

94. *See id.* at 1349.

95. For a classic exposition of the view that claims about greater and lesser freedom can be said to be more and less reasonable, *see generally* I. BERLIN, FOUR ESSAYS ON LIBERTY (1969) (arguing for the genuineness and moral importance of "negative" liberty).

96. *Cf.* Sober, *Apportioning Causal Responsibility*, 85 J. PHIL. 303, 304 (1988) (no such thing as the way science in general apportions causal responsibility).

97. *Cf. id.* (apportionment of causal responsibility as process specific to particular sciences).

98. Chemerinsky, *More Is Not Less: A Rejoinder to Professor Marshall*, 80 NW. U.L. REV. 571, 572 (1985).

99. *See, e.g.*, J. FISHKIN, THE LIMITS OF OBLIGATION 3-6 (1982); J. GLOVER, CAUSING DEATH AND SAVING LIVES 94, 104-05 (1977); Barry, *And Who Is My Neighbor?*, 88 YALE

practical limit[100] or beyond heroic bounds,[101] so may we distinguish mainstream liberal democracies from the most extreme sort of totalitarian states in terms of their scope of governmental responsibility. In a system of limited government, some constitutional guarantees limit the scope of ascription of responsibility to government, even if the government might have taken, but did not take, steps to prevent the complained of private action.[102]

B. Schemata of the Concept of Responsibility

Writers on the idea of responsibility have schematized the concept in various ways, depending upon their interests and purposes. One of the most useful typologies, for example, distinguishes four senses or uses of the concept. These uses include responsibility for an assigned task, responsibility in the sense of conscientiousness and reliability, responsibility in the sense of having been a cause of a particular event, and responsibility as blameworthiness or culpability.[103] The sense of responsibility involved in the state action cases is closely associated with task responsibility, through a constitution or a moral theory. The public, however, generally might assign certain limited tasks, negative and positive, to a government. The analysis of state action probably partakes to some degree as well of causal responsibility in at least some cases, as we shall see below.[104] The state action literature also promotes the concept of the government's deserving a measure of blame,[105] but such blameworthiness does not result in legal, as opposed to moral, culpability for the state, as opposed to the private actor, in the state action context.[106]

Other writers, including H.L.A. Hart,[107] Graham Haydon,[108] and

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L.J. 629, 653-54 (1979) (discussing proposed limits on the scope of personal responsibility). *But cf.* J. FISKIN, *supra*, at 24 (discussing possible higher standard for public officials).

100. Jonathan Glover quotes Father Zossima's report, in *The Brothers Karamazov*, of his younger brother's admirable view that "everyone is really responsible for everyone and everything." J. GLOVER, *supra* note 99, at 104.

101. *See* Singer, *Famine, Affluence and Morality, in Philosophy, Politics and Society* 21-35 (5th series) (P. Laslett & J. Fishkin eds. 1979) (adopting a relatively broad, stringent view of the bounds of personal moral reponsibility).

102. As we shall see below, the possibility of ascribing responsibility based on a failure to act or an omission, in certain cases, does not imply responsibility for everything in some sense within one's powers that was not done. *See* J. GLOVER, *supra* note 99, at 95.

103. *See* Flores & Johnson, *Collective Responsibility and Professional Roles*, 93 ETHICS 537, 538 (1983).

104. *See infra* notes 112, 113, 115 and accompanying text.

105. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961) (government "abdication" of responsibilities in failing to censure racial discrimination).

106. Flores and Johnson rightly recognize that "[t]o say that a person bears responsibility does not necessarily imply that he should be punished." Flores & Johnson, *supra* note 103, at 539.

107. *See* Hart, *Varieties of Responsibility*, 83 L.Q. REV. 346, 346 (1967) (distinguishing role,

Tony Honore,[109] have devised or relied upon somewhat similar schemata. Each schema itself will unavoidably tend to involve some internal overlap. For example, while some possibility exists of assigning responsibility without blame, a person or government might well be morally blamed, incurring one kind of responsibility, for failing, or failing inexcusably, to fulfill an assigned task, which is a separate sort of responsibility.[110] Failure to fulfill an assigned task or role[111] may incur responsibility in a way that overlaps as well with responsibility for the "consequences or results or upshots"[112] of one's actions.[113] This conceptual pluralism and conceptual overlap, however, does not necessarily imply conceptual confusion.

It should be pointed out that task responsibility, which has occasionally been singled out in the philosophical literature,[114] is not an inherently restrictive, positivistic, or conservative notion. Much of nineteenth and twentieth century American public policy debate can be cast in terms of disputes as to the proper bounds or limits of governmental task responsibility. Serving as a "night-watchman" is one conception of proper governmental task responsibility, but radical egalitarianism, or eradication of all vestiges of discrimination, are also conceivable governmental tasks. It is no objection that these latter, more demanding tasks cannot possibly be fulfilled in their entirety by any familiar sort of government. Some task responsibilities cannot, by their very nature, be fully and completely discharged.[115] If task responsibility must relate to tasks actually dischargeable by a government with limited resources, room still exists for a broad, progressive legal doctrine of state action. The government cannot, on such an approach, be deemed responsible for failing to prevent, for example, each and every act of private discrimination.[116] Its

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causal, liability, and capacity responsibility); *see also* Wright, *Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts*, 73 IOWA L. REV. 1001, 1012 (1988) (distinguishing legal liability-responsibility from causal responsibility).

108. *See* Haydon, *On Being Responsible*, 28 PHIL. Q. 46, 46-47 (1978) (distinguishing virtue, capacity, liability, and causal responsibility).

109. *See* Honore, *Responsibility and Luck*, 104 L.Q. REV. 530, 531 (1988) (focusing in particular on "outcome responsibility").

110. *See*, H. PITCHER & T. HONORE, CAUSATION IN THE LAW 63 (2d ed. 1985) (discussing responsibility in the absence of blameworthiness); Hart, *supra* note 107, at 349.

111. *See generally* Hart, *supra* note 107.

112. Pitcher, *Hart on Action and Responsibility*, 69 PHIL. REV. 226, 227 (1960).

113. Pitcher distinguishes task responsibility from responsibility for consequences. *Id.* at 227.

114. *See, e.g.*, Goodin, *Apportioning Responsibilities*, 6 L. & PHIL. 167 (1985); Goodin, *Responsibilities*, 36 PHIL. Q. 50, 50 n.1 (1986).

115. Goodin, *Responsibilities*, 36 PHIL. Q. 50, 54 (1986).

116. The concept of responsibility itself does not require, though, that the person have been in a position to control or prevent the event in question, at least at the time of the event. This

task responsibility, however, may still require the state to exert reasonable or best efforts to prevent such discrimination, or at least to avoid profiting from or legitimizing such private discrimination.[117]

C. *Additional Factors Affecting Responsibility*

What allows us to find responsibility in the relevant sense will often be unavoidably complex, but the process is not utterly unstructured and open. Admittedly, the process requires judgment. Professor Joel Feinberg has rightly observed that "legal responsibility in problematic cases is relative to a variety of conflicting interests, purposes, and policies and cannot simply be 'read off' the facts."[118] In the easy state action cases, the courts can readily find state action on the basis of the relative explanatory richness of the state's involvement.[119] In the closer cases, a pattern of typical considerations emerges.

One such consideration is the seriousness of the substantive moral evil complained of in the case. It is often suggested quite falsely that when courts appear to consider the gravity of the harm alleged when deciding a state action issue, they must be illegitimately and unjustifiably "peeking" ahead at the constitutional merits of the case.[120] This need not be so. As a matter of moral common sense, the scope of responsibility of a person or a state tends to expand or contract with the degree of seriousness of

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is especially so if the person being held responsible had deliberately "disabled" himself from being able to control the event in question. *See* Zimmerman, *Negligence and Moral Responsibility*, 20 NOUS 199, 205 (1986) (discussing this possibility).

117. *See generally* Burton v. Wilmington Parking Auth., 365 U.S. 715, 724 (1961) (noting the possibility of state benefit from or symbiosis with the alleged discrimination).

118. J. FEINBERG, DOING AND DESERVING 26-27 (1970) (emphasis in the original); *see also id.* at 141 (discussing relativity of ascriptions of responsibility to context, values, policies, rules, and practices).

119. *Cf.* D. BRAINE, THE REALITY OF TIME AND THE EXISTENCE OF GOD 272 (1988) (responsibility of a billiard player is attributable to greater "richness" of his actions in accounting for the positions of billiard balls). The explanatory richness of one actor's contribution to an event may reflect the unusual, abnormal, or extraordinary character of that actor's action or inaction. *See* D. EMMETT, THE EFFECTIVENESS OF CAUSES 59 (1985); J. FEINBERG, *supra* note 118, at 143; Stapleton, *Law, Causation and Common Sense*, 8 OXFORD J. LEGAL STUD. 111, 114, 117 (1988). The "explanatory richness" of a cause is, however, at least in the state action context, also a function of, at a minimum, the desirability of what the state has done or has omitted. *See* Sunstein, *supra* note 56, at 887. The state ultimately cannot evade responsibility on the grounds that its behavior was common, expected, or traditional. The state's responsibility for private racial discrimination, for example, does not become insignificant merely because the state's role may be historically unchanging, or even broadly popular.

120. *See, e.g.*, Chemerinsky, *supra* note 6, at 540; Glennon & Nowak, *supra* note 14, at 224 ("traditional theory of state action both the value of the challenged practice and the nature of the complainant's asserted rights are irrelevant"); Phillips, *supra* note 6, at 742; Rowe, *supra* note 6, at 769; *cf.* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 373-74 (1974) (Marshall, J., dissenting) ("[t]he Court has not adopted the notion, accepted elsewhere, that different standards should apply to state-action analysis when different constitutional claims are presented").

the harm that action might prevent. We are more properly called to account for failing to give up an hour's sleep in order to save a life than to cure a painful hangnail. Thus, the common suggestion that the courts do or should find state action more readily in racial discrimination than in non-racial benefit termination cases, for example, need not reflect judicial subterfuge, but rather the very logic of the concept of responsibility itself.[121]

Some considerations affecting personal responsibility do require translation into the governmental sphere. For example, on most common moral theories, the physical distance between the potential rescuer and the rescuee, the latter's accessibility, or the fact that some sort of geographical or jurisdictional boundary would have to be crossed, may make a direct or indirect difference in the potential rescuer's scope of responsibility. This may reflect nothing more than the cost of the rescue, or the degree of knowledge as to how to effect the rescue or whether a rescue is even appropriate.[122] Government responsibility looks to similar considerations, but a geographical boundary often either does not affect,[123] or decisively limits, government responsibility.[124] In addition, we may count costs a bit differently in the case of government. The direct financial costs of imposing responsibility on the government for performing a certain task is certainly important, but the indirect costs in terms of increased governmental intrusion, loss of privacy, and the potential for governmental abuse and aggrandizement are also important,[125] or at least more important than is often the case when assigning responsibility to private individuals.

Whether a person should be considered responsible for an outcome often reflects, as well, the element of intent.[126] Again, there must be some translation of this element into the realm of state action. Governments may be found not responsible for a private act for such reasons as blameless ignorance or incapability of affecting the event that is being constitutionally challenged. However, a government, unlike a private individual, cannot generally evade responsibility on grounds that it was

121. *See, e.g.*, Davis, *The Supreme Court: Finding State Action . . . Sometimes*, 26 How. L.J. 1395, 1422-23 (1983); Friendly, *supra* note 6, at 1291; Schneider, *supra* note 54, at 742; Note, *supra* note 63, at 657. *But cf.* Rotunda, *Runyon v. McCrary and the Mosaic of State Action*, 67 Wash. U.L.Q. 47, 56-57 (1989) (expressing doubt as to the Court's greater willingness to find state action in racial discrimination cases).

122. *See, e.g.*, J. Fishkin, *supra* note 99, at 72-74; Barry, *supra* note 99, at 652-54.

123. Presumably, the federal government cannot cite a state boundary line as grounds for diminishing its own responsibility as a non-resident individual might.

124. Generally, the federal or state government's constitutionally-based responsibility would stop abruptly at the national border, however morally arbitrary this may seem.

125. *See generally* Marshall, *Diluting Constitutional Rights: Rethinking "Rethinking State Action"*, 80 Nw. U.L. Rev. 558 (1985).

126. *See* Zimmerman, *Sharing Responsibility*, 22 Am. Phil. Q. 115, 115 (1985).

subject to duress, coercion, or undue influence. The motive[127] or intent[128] underlying a government act or omission is sometimes nonetheless of constitutional relevance.

The extent to which the government's lack of intent that the challenged event occur actually absolves the state of responsibility may sometimes be unclear. Some scholars have noted that persons can be called to account for consequences beyond those that they intended.[129] These would include events that were foreseen but not intended,[130] as well as events that occurred by virtue of the mere negligence of the party sought to be held responsible.[131] Some of the cases in which courts have found state action are best explained on the basis of the government's negligence, rather than on any governmental intent to underwrite or endorse the particular complained of evil.[132] The case law makes clear, however, that the government's foresight of a particular adverse consequence of its own action is not invariably sufficient under all circumstances to render the state responsible for that consequence.[133] As a general rule, the government may be responsible for consequences it had foreseen, but did not intend, in proportion to the clarity and degree of moral objectionability of the underlying private act which it gave effect to or acquiesced in, in addition to other considerations bearing on governmental responsibility discussed above.

Courts will inevitably find some cases to be close to the boundary line between the state's being responsible and not being responsible, wherever that boundary line is drawn. Some state action cases will be difficult to resolve after all of the relevant considerations have been assigned their

127. *See* L. TRIBE, *supra* note 1, at 1700 & n.6; Halberstam, *Trying and Responsibility*, 28 TULANE STUDIES IN PHILOSOPHY: STUDIES IN ACTION THEORY 124 (R. Whittemore ed. 1979).

128. *See* Washington v. Davis, 426 U.S. 229, 248 (1976).

129. *See* Miller, *supra* note 12, at 75 (discussing the views of the philosopher Anthony Kenny).

130. *See* Baldwin, *supra* note 12, at 352-53. *But cf. id.* at 355 (a person may not be responsible for all foreseen consequences of his actions); *see also* Kagan, *supra* note 12, at 301 (moral implications of distinction between intending and foreseeing not entirely clear).

131. *See generally* Zimmerman, *Negligence and Moral Responsibility*, 20 NOUS 199 (1986).

132. For instance, Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) would seem to involve governmental negligence or inadvertence rather than a specific intent on the part of the state to endorse or support private racial discrimination.

133. Consider a case in which a state knowingly admits to probate a will which, on its face, provides for a bequest to A rather than B solely on grounds of the testator's expressly avowed racial bigotry. Regardless of the merits of B's due process claim, there is good reason for finding state action in the case, despite the state's lack of intent to discriminate. This would be partly in view of the inescapable moral gravity of the underlying act, to which the government appears to consciously acquiesce, and to which it now gives legal effect. *See* Henkin, *supra* note 9, at 499-500. The state may incur responsibility in such a case even if, as a general matter, it consistently condemns and penalizes racial discrimination in other contexts, and even if it had no practical means available to prevent the will's being drafted in such a fashion.

proper weight. In such cases, the courts may still be in a position to reasonably decide the state action issue. One useful technique would be for the court to examine the conduct, at all relevant times, of both the party asserting the existence of state action, and the party denying that state action is present. The court could inquire whether either party had, but failed to avail itself of, a practical, low-cost opportunity, at the relevant time, to make the state action issue easier to adjudicate. Specifically, the court might ask whether the plaintiff could have easily tied the state more clearly to the defendant's challenged act. The court might also ask whether the defendant did all that it easily could have done to distance or dissociate itself from the state, with respect to the challenged conduct.[134]

D. Some Remaining Problems

One of the most important unresolved problems in the area of state action concerns the status of state omissions. This is occasionally phrased in terms of whether the state can "act by failing to act."[135] This particular formulation is phrased misleadingly for several reasons. First, it may be proper to distinguish the state's mere inaction from a "failure" to act. There is no reason to believe that non-acting, omitting, refraining, and failing to act are all related to responsibility in the same manner.[136] It should also be noted that the constitutional text does not speak in terms of state action or inaction, but rather in terms of denying, depriving, and so forth.[137]

Too often, the courts become mesmerized by the distinction between acting and failing to act. The Court in *Flagg Brothers, Inc. v. Brooks*,[138] for example, reached the finding of no state action by pointing out that "the crux of respondents' complaint is not that the state *has* acted, but that it has *refused* to act."[139] The Court's assumption that a state's refusal to act cannot constitute "state action" is reinforced by the Court's focus on "conduct,"[140] which seems to refer most directly to positive action. In another context, the Court has suggested that "when an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon

134. For the fuller development of a similar mechanism of resolving close cases in another context, *see* Wright, *Speech On Matters of Public Interest and Concern*, 37 DE PAUL L. REV. 27 (1987).

135. Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083, 1085 (1960).

136. *See, e.g.*, Gorr, *Omissions*, 28 TULANE STUDIES IN PHILOSOPHY: STUDIES IN ACTION THEORY 93 (R. Whittemore ed. 1979); Weinryb, *supra* note 12, at 1.

137. This distinction is noted in Black, *supra* note 3, at 73.

138. 436 U.S. 149 (1978).

139. *Id.* at 166 (emphasis in the original).

140. Lugar v. Edmundson Oil Co., 457 U.S. 922, 924 (1982).

areas that courts often are called upon to protect."[141]

The Court's analysis, in this respect, is completely unsatisfactory. As an extreme, but clear, example, consider the case of a government's systematic, malicious refusal to provide any police protection for specified residential neighborhoods. Whether the government is seeking to coerce the residents in some way is irrelevant. Plainly, the government's failure and refusal to act, or to provide any police protection, may deny the affected residents the equal protection of the laws. This result flows from a literal reading of the fourteenth amendment. Upon analysis, the government might well bear responsibility in such a case for some related injurious private acts. As the Court itself has observed, "no state may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be."[142]

One might object, however, that even if a government may incur responsibility by failing to act, the conceptual problems do not end. Consider a case involving the fully competent private actor, who, we shall assume, is under no compulsion or duress and who carefully and deliberately considered the challenged conduct. Surely this is a case in which we might want to hold the private actor "fully" responsible for his own actions. In such a case, is there any responsibility "left over" for the government to bear? Relying on a strong version of what has been called "ethical dilutionism,"[143] one may argue that in these cases some fixed amount of responsibility exists for the challenged practice, that this responsibility "is like a pie to be divided,"[144] and that the private actor's full responsibility means that there can be no responsibility left over for the government.

It is true that people often behave as if responsibility were ordinarily diluted by being shared, or that one person's being "fully" responsible means that others cannot share in the responsibility.[145] The predominant

141. Heckler v. Chaney, 470 U.S. 821, 832 (1985) (emphasis in the original). *But cf. id.* at 838 (apparently holding open the possibility that government's failure to act might in some cases violate individual constitutional rights).

142. Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961). *See* Black, *supra* note 3, at 73 (discussing "denial" of protection through inaction); Zimmerman, *Sharing Responsibility*, 22 AM. PHIL. Q. 115, 118 (1985)("one can be morally responsible to some extent for the outcome of an omission"). None of this is to deny that there may be morally relevant distinctions between acts and omissions. *See* Baldwin, *supra* note 12, at 355.

143. *See* Mellema, *On Being Fully Responsible*, 21 AM PHIL. Q. 189, 190 (1984) (discussing view that responsibility is fixed in total amount, regardless of its allocability among greater or fewer numbers of potentially responsible actors).

144. *Id.*

145. *See generally* Latane & Darley, *Social Determinants of Bystander Intervention in Emergencies*, ALTRUISM AND HELPING BEHAVIOR 13-27 (J. Macauley & L. Berkowitz eds. 1970); Mellema, *Shared Responsibility and Ethical Dilutionism*, 63 AUSTRALASIAN J. PHIL. 177, 177 (1985).

view among philosophers, however, is that "moral responsibility . . . is not a fixed-sum game."[146] As one writer commenting on responsibility in government states, "[t]here is no fixed pool of responsibility such that when one person's share goes up, another's must go down."[147] A theory of state action based on state responsibility need not go so far as to pretend that the state is as responsible as it would have been if the government itself had played all of the roles in the challenged action.[148] But the government may in a proper case, be said to be fully responsible for that particular outcome even though the government is not solely responsible for that outcome.[149]

In an extreme case, it is even possible to imagine finding that the government in some sense bears a greater responsibility for producing an outcome in cooperation with a private actor than if the government had produced the same outcome alone. This possibility exists because responsibility is not solely a matter of causation,[150] but of morality as well. It may be that in the first case the very clarity and vividness of the cooperating private actor's moral depravity should serve to bring home to the state the moral hideousness of the role that the state itself is undertaking. Were it not for the presence of a negative moral example in the private

146. Barry, *supra* note 99, at 650.

147. Thompson, *Ascribing Responsibility to Advisers in Government*, 93 ETHICS 546, 554 (1983). *See generally* Zimmerman, *supra* note 141 (rejecting ethical dilutionism).

148. *See* Mellema, *supra* note 145, at 183.

149. *See* Zimmerman, *Intervening Agents and Moral Responsibility*, 35 PHIL. Q. 347, 355 (1985).

150. The relationship between causation and responsibility, in general, is controversial. Scholars have often suggested, perhaps misleadingly, that legal responsibility or more accurately, legal liability, does not require a showing of causation. *See, e.g.*, Stapleton, *supra* note 119, at 129; Thompson, *Remarks on Causation and Liability*, 13 PHIL. & PUB. AFF. 101, 101 (1984). Some writers have suggested that moral responsibility is not invariably dependent upon causation. *See, e.g.*, D'Amato, *The "Bad Samaritan" Paradigm*, 70 NW. U.L. REV. 798, 808-09 (1975); Mack, *Bad Samaritanism and the Causation of Harm*, 9 PHIL. & PUB. AFF. 230, 233-35 (1980). Others have suggested that responsibility in at least some sense generally requires a showing of causation. *See, e.g.*, Green, *Refraining and Responsibility*, in 28 TULANE STUDIES IN PHILOSOPHY: STUDIES IN ACTION THEORY 108 (R. Whittemore ed. 1979); Thompson, *supra* note 147, at 547 (reporting a commonly held view); Weinryb, *supra* note 12, at 2-3; Zimmerman, *supra* note 131, at 120.

In contexts where causation is necessary for responsibility, it is controversial whether an omission can be said to make a causal contribution to an event. *See, e.g.*, Gorr, *supra* note 136, at 101; Green, *supra*, at 110-11; Husak, *supra* note 12, at 320-21. In the state action context, much of this controversy can be bypassed. In a case in which, for example, the government willfully fails to keep its promise, thereby failing to do something, the government may clearly bear responsibility for some of the ensuing challenged private party acts or their consequences, whether or not we choose to adopt the language of causation. Additionally, the government's unexpected ratification of a private act may bring a share of responsibility upon the government for that prior act, even though the government's ratification cannot flow backwards in time to cause the ratified private act.

actor, we might be less inclined to impute responsibility to the state for certain consequences of the state's own actions.

V. CONCLUSION

The clear consensus among observers is that the concept of state action is either inherently meaningless or irremediably confused. It is often suggested that state action will inevitably be present in any litigated case. Courts occasionally encourage these severe judgments, as when they falsely assert that a state's failure to act cannot constitute "state action," or when the courts give the appearance of illegitimately considering the constitutional merits in deciding the state action issue, without explaining the relation between the gravity of the harm at issue and the presence or absence of state action. Regardless, the consensus is mistaken.

This Article has taken up the courts' own use of the idea of responsibility in the state action context, and has attempted to bring some of the enormous philosophical literature on the concept of responsibility to bear on an analysis of state action. As it turns out, while the general result of attending to the philosophical literature above has been to liberalize or broaden the range of circumstances in which state action can be found, this may reflect the problems selected for discussion. It certainly is not inevitable that the doctrine of state action be broad and inclusive. This Article suggests, however, that if we adopt a narrow, restrictive doctrine of state action, we must do so only in connection with narrowing and restricting of the range of circumstances, actions, and events for which we consider our government responsible.